(9)

No. 03-5554

Supreme Court, U.S.
FILED
DEC 15 2003
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

LARRY D. HIIBEL,

*Petitioner,*

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, et al.,

*Respondents.*

**On Writ Of Certiorari To The Supreme Court Of Nevada**

## BRIEF AMICUS CURIAE OF JOHN GILMORE IN SUPPORT OF PETITIONER

JAMES P. HARRISON
LAW OFFICE OF JAMES P. HARRISON
980 9th Street, 16th Floor
Sacramento, CA 95814
(916) 492-9778

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF *AMICUS CURIAE* | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 2 |
| I. Air Travelers are Not Required to Produce Identification | 2 |
| II. The Absence of an Air ID Requirement Supports Reversal | 8 |
| CONCLUSION | 12 |

## INTEREST OF *AMICUS CURIAE*[1]

John Gilmore has done extensive legal and factual research on identity requirements. He respectfully submits this brief to bring to the Court's attention an error of law made by the Supreme Court of Nevada in its decision.

Like Mr. Hiibel, Mr. Gilmore was himself arrested in 1996 for "delaying or obstructing a peace officer in the performance of their duties." He was arrested in an airport, after refusing a police officer's demand for identification. The charge was never prosecuted, yet Mr. Gilmore was arrested, searched, transported, and detained for many hours. Like the "dedicated libertarian" mentioned in the Nevada Supreme Court dissent, Mr. Gilmore has deliberately chosen to have neither a driver's license nor a state-issued identification ("ID") card. If this Court decides that any police officer can demand identification based upon the slightest suspicion, Mr. Gilmore will continually be at risk of arrest, prosecution, and incarceration.

On July 4, 2002, Mr. Gilmore was not allowed to board commercial aircraft at two airports because he declined to show ID and declined to consent to a more intense suspicionless search based on his lack of ID. Mr. Gilmore is thus the plaintiff in Gilmore v. Ashcroft, et al., C02-03444, presently before Federal District Court Judge Susan Illston in the Northern District of California, where he

---

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

seeks to uphold the long-standing constitutional rights to travel and to pursue a lawful existence without being required to carry "identity papers."

## SUMMARY OF ARGUMENT

The Nevada Supreme Court has made an error of law. Contrary to statements made by that Court, no law or regulation requires travelers to show identification before traveling by air in the United States. To the extent that the constitutionality of Mr. Hiibel's arrest relies on the argument that "everyone is required to reveal government issued identification to airport officials", the decision below should be reversed.

## ARGUMENT

### I. Air Travelers are Not Required to Produce Identification

The Executive Branch has effectively convinced the public, apparently including all the judges of the Nevada Supreme Court, that travelers are required to show government-issued identification before flying. Signs in airports from the Transportation Security Administration state, "Passengers must present a BOARDING PASS and PHOTO IDENTIFICATION." Other signs headed "A Notice From the Federal Aviation Administration" include the sentence "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." The TSA's web



site states "Boarding Pass and Photo ID Required To Get to Your Gate."[2]

However, no such requirement has ever been enacted by Congress. Nor has any such requirement ever been published in the Federal Register by any Executive Branch agency. Neither FAA nor TSA has ever legally required travelers to have or present identification in order to travel. Although the government posts signs, and armed guards eject travelers who decline to show identification, federal agency officials freely admit that there is no such requirement.

FAA, DOT, and airline officials have repeatedly stated in writing that there is no federal requirement that passengers identify themselves. When these responsible officials are asked for the written rules, they disclaim the existence of a published law or regulation that requires identification. Their official position is that there is merely a "request", not a "requirement", that passengers provide their identification. Though the government admits to issuing secret orders making airlines "request" ID, and discouraging carriers from allowing unidentified passengers to fly, they also firmly state that there is no prohibition on flying without ID. Mr. Gilmore submits the attached documents as evidence for this statement.

As far back as April 1996, Cathal L. Flynn, Associate Administrator for Civil Aviation Security at the FAA, admitted in a letter sent to publisher Robert Ellis Smith:

[2] http://www.tsa.gov/public/interapp/editorial/editorial_1044.xml (as viewed on December 10, 2003)

> "The FAA issued a Security Directive to be put into effect at airports throughout the country . . . It is a countermeasure listed within this Security Directive that mandated that airlines request a valid form of identification from airline ticket holders. While an airline is required to request identification, the actual presentation of identification by the passenger is not absolutely required, and there is currently no prohibition against allowing someone on an aircraft without such identification.
>
> . . . Refusal to allow a passenger without a photo identification to board the aircraft . . . is the policy of an individual airline; this is not an FAA security requirement."

(Exhibit A)

In a May 1997 response to Samuel Weiler's FOIA request, the same Cathal L. Flynn again stated:

> " . . . the Federal Aviation Administration (FAA) has required airlines to request a valid form of identification from airline ticket holders. While an airline is required to request the identification, its actual presentation by the passenger is not mandatory, and there is currently no prohibition against allowing someone on an aircraft without such identification. The absence of identification, however, requires the airline to use alternative measures to provide the same level of security protection.
>
> The security directive (SD) in force at the time of your flight would be the governing legal document sent to the airlines relative to the question of ID checks. When necessary, a policy guidance letter may be sent by FAA in order to clarify the Government's intent or to address an airline's interpretation of security measures in an SD; measures such as ID checks. Neither of these documents are disseminated to the public, nor are they releasable."



(Exhibit B)

In June, 2001, James F. Parker, the General Counsel and incoming CEO of Southwest Airlines, wrote to Dr. Richard Weil:

> "Unfortunately, I am unable to discuss with you the FAA-mandated requirement that, under certain circumstances, Southwest Airlines and all other domestic air carriers request identification from their Customers. This inability does not stem from any unwillingness on the part of Southwest Airlines to challenge the FAA (as we have done on countless occasions over our 30 year history), but instead derives from an FAA-imposed mandate which effectively prevents Southwest Airlines from disclosing sensitive security information to the general public.
>
> . . . Therefore, we must respectfully decline to join you in opposing the requirement that Customers present identification."

(Exhibit C)

In December 2001, Secretary of Transportation Norman Y. Mineta wrote in a letter to Dr. Richard Weil:

> "Congresswoman Betty McCollum has asked me to respond to your letter concerning requirements to show photo identification before boarding an aircraft.
>
> [¶] . . .

> The FAA does require the air carriers to request valid forms of identification from their ticket holders. However, should a passenger not present acceptable identification because they do not have a photo identification card or refuse to show such identification, an air carrier must apply alternative measures of their choosing that provide the same level of security protection. Some of these alternative means are visible to the passenger and some are not. It is the carrier's right to deny boarding rights to any passenger it does not believe can be properly screened."

(Exhibit D)

On January 17, 2003, during oral arguments on the government's motion to dismiss Gilmore v. Ashcroft, et al., Mr. Joseph LoBue, Assistant U.S. Attorney, stated:

> "THERE IS NO RULE REQUIRING PRODUCTION OF ID'S FOR WHICH ONE CAN BE ARRESTED, THERE'S NOTHING LIKE THAT. PLAINTIFF WASN'T ARRESTED, HE WAS ASKED FOR AN IDENTIFICATION CARD, THAT'S IT. WHEN HE DIDN'T PRODUCE IT HE LEFT. HE WASN'T DETAINED, HE WASN'T SEIZED; HE WAS ASKED FOR IDENTIFICATION."

(Exhibit E, page 31)

When Judge Illston attempted to elicit from the government exactly what law she was to evaluate for constitutionality, Mr. LoBue alleged that he cannot disclose the specific rule about ID, since it is in a secret security directive:

> THE COURT: WHAT IS THE RULE, IF AT ALL, CONCERNING IDENTIFICATION?



> MR. LOBUE: THE IDENTIFICATION CHECK, EVERY PASSENGER IS REQUESTED TO PRODUCE IDENTIFICATION. AS I'VE INDICATED, THE STATUTE PROVIDES ONE OF THE PURPOSES TO CHECK WHETHER THAT PERSON IS AMONGST THOSE KNOWN TO POSE A RISK TO AVIATION SAFETY.
>
> THE OTHER REASON IT'S USED FOR PURPOSES OF THE PRESCREENING SYSTEM, IS THIS A PERSON –
>
> THE COURT: I UNDERSTAND IT, YOU SAID ALL OF THAT. YOU WERE SAYING THE RULE IS NOT VOID FOR VAGUENESS AND WE CAN MOVE ON. I JUST WANT TO KNOW WHAT THE RULE IS THAT ISN'T VOID.
>
> MR. LOBUE: IF YOU'RE ASKING ME TO DISCLOSE WHAT'S IN THE SECURITY DIRECTIVES, I CAN'T DO IT.
>
> THE COURT: I WANT TO KNOW WHAT WE'RE TALKING ABOUT IN THIS CASE. THIS MAN WAS TOLD, "GIVE ME YOUR ID"?
>
> MR. LOBUE: ACCORDING TO THE COMPLAINT THE GOVERNMENT MANDATED AIRPLANES TO REQUEST IDENTIFICATION FROM EACH AND EVERY PASSENGER, THAT'S WHAT HAPPENED.
>
> THE COURT: I NEED TO KNOW WHAT CITE I'M TALKING ABOUT WHEN I TRY TO MAKE A DECISION WHETHER THIS COMPLAINT STATES A CLAIM. SO CAN I FOCUS ON THAT, THAT THE GOVERNMENT REQUIRED THE AIRLINE TO –
>
> MR. LOBUE: I THINK YOU HAVE TO ASSUME THAT THE ALLEGATIONS IN THE

COMPLAINT ARE, IN FACT, TRUE FOR PURPOSES OF OUR MOTION, YES. THAT THE GOVERNMENT REQUIRED THE AIRLINES TO REQUEST IDENTIFICATION FROM THE PASSENGERS.

THAT WHEN THEY REFUSE TO PROVIDE IT, THAT SOUTHWEST AIRLINES REFUSED PASSAGE, AND UNITED AIRLINES INDICATED THAT THE PLAINTIFF WOULD BE ALLOWED TO FLY IF HE SUBMITTED TO A FURTHER SEARCH.

WE WERE PREPARED TO ASSUME ALL OF THAT IS TRUE FOR PURPOSES OF THE COMPLAINT, THEY ACTED AT THE INITIATIVE OF THE GOVERNMENT. AT THE BEHEST OF THE GOVERNMENT.

THE COURT: THANK YOU.

(Exhibit E, pages 31-32)

Despite the government's frequent attempts to confuse the public, these statements demonstrate that no published law or regulation requires air travelers to present identification. Instead, the requirement is a classic case of secret law. Mr. Gilmore respectfully suggests that the lack of published law and the secrecy surrounding the airport ID requirement exist *because* federal officials recognize that such a written requirement would be subject to a strong constitutional challenge.

## II. The Absence of an Air ID Requirement Supports Reversal

The Nevada Supreme Court's decision partially rests on the premise that, because all passengers must show ID to board an aircraft, Mr. Hiibel's arrest and conviction for



failure to show ID are constitutional, because Mr. Hiibel's search was less intrusive by comparison. However, since no legislature authorized these airport-ID practices, nor has any court yet ruled on their constitutionality, the essence of the argument is that actions taken by fiat by the Executive Branch in airports can change an unconstitutional roadside search into a constitutional one. This argument should be rejected.

Nevada and its Supreme Court argue that the existence of an ID requirement for travelers would support the state's demand for ID in *Terry* stops. We have just shown that such an ID requirement for travelers does not exist. Following their reasoning, the *absence* of any actual law justifying ID requirement for travelers *undermines* Nevada's argument that ID can be demanded during *Terry* stops. With one exception, the *only* situation the Nevada Supreme Court could find in which citizens are required to show an ID has now been shown to be a figment – a public relations maneuver unsupported by any legal authority. The sole exception is the safety requirement that operators of motor vehicles, a potentially dangerous machine, show a driver's license. The rest of the situations they cite, such as names on business cards, are voluntary transactions hardly comparable to a compelled *Terry* stop.

Nevada Supreme Court Justice Young's majority opinion states:

> "The requirements of NRS 171.123(3) are also reasonable and involve a minimal invasion of personal privacy.[28] Reasonable people do not expect their identities – their names – to be withheld from officers. Rather, we reveal our names in a variety of situations every day without much consideration. For instance, it is merely polite manners to introduce ourselves

> when meeting a new acquaintance. A person's name is given out on business cards, credit cards, checks, and driver's licenses, to name a few more instances. In addition, *everyone is required to reveal government issued identification to airport officials* and are subject to random searches before proceeding to flight gates. Asking a suspect to state his or her name when an officer has an articulable suspicion *is nominal in comparison.*"

59 P.3d 1201, 1206 (2002) [emphasis added].

The dissenting opinion of Nevada Supreme Court Justice J. Agosti, with JJ. Shearing and Rose, states:

> "The majority avoids the fact that knowing a suspect's identity does not alleviate any threat of immediate danger by arguing that a reasonable person cannot expect to withhold his identity from police officers, as we reveal our names to different people everyday. What the majority fails to recognize, however, is that when we give our names to new acquaintances, business associates and shop owners, we do so voluntarily, out of friendship or to complete a transaction. *With the heightened security at airports, for example, passengers are required to provide picture identification.* But non-passengers are free to wander that portion of the airport that is unsecured without showing an ID. *Purchasing an airline ticket is a business transaction, and the airlines may condition the sale on knowing who the purchaser is. In contrast, being forced to identify oneself to a police officer or else face arrest is government coercion – precisely the type of governmental intrusion that the Fourth Amendment was designed to prevent.* Furthermore, it is not necessary to have one's name on a credit card or checkbook in order to effect a purchase. A dedicated libertarian, for example, might deliberately eschew financial institutions, credit cards and checkbooks, engaging solely in cash transactions, in order to jealously protect his individual rights, especially his right to be anonymous, to be left alone, to wander freely."



59 P.3d 1201, 1209 (2002) [emphasis added].[3]

Respondent's petition opposing certiorari to the U.S. Supreme Court, page 7, states:

> " . . . In order to function in our society it is necessary that a person provide their name under a variety of governmental imposed requirements. A person can not obtain a job without first providing identification to their potential employer. This is required because the employer needs to complete paperwork required by the state and federal government as it relates to wage withholding and benefits. Lending institutions governed by governmental rules and regulations require a person to provide identification before a loan can be approved. *Individuals can not attend schools, travel the airlines or obtain a credit card without revealing their identification.* In addition, individuals who are stopped for traffic violations provide identification to the officer. These

[3] There are two errors in this passage. The first is that passengers are required to show ID. The second is that airlines freely make a business decision to require identification of passengers, independent of government coercion. The government admits that its own secret directives *require* airlines to "request" identification from every traveler, or *require* them to apply some unspecified "alternative security measures" if the passenger does not comply.

> are just some examples that illustrate how pervasive the requirement to provide identification has become in our society."

[emphasis added]

The Nevada Supreme Court and Respondent are in error. Individuals are free to travel by air without revealing their identification. The lack of such a requirement undercuts the argument that individuals standing by a roadside can be reasonably required to show identification or be arrested.

## CONCLUSION

The Nevada Supreme Court supported its decision with a faulty premise. It assumed that the pervasiveness of ID demands in airports meant that the practice must be lawful and constitutional. Instead, the absence of any law or regulation requiring air travelers to show identification suggests that the practice is neither lawful nor constitutional. Unpublished airport identification practices, operating as secret law, cannot support the constitutionality of the Nevada law that requires identification during *Terry* stops.

Respectfully submitted,

JAMES P. HARRISON
LAW OFFICE OF JAMES P. HARRISON
980 9th Street, 16th Floor
Sacramento, CA 95814
(916) 492-9778



**EXHIBIT A**

Associate Administrator
for Civil Aviation Security

[LOGO]
U.S. Department
of Transportation
**Federal Aviation**
**Administration**

800 Independence Ave., SW.
Washington, DC 20591

APR 19 1996

Mr. Robert Ellis Smith
Publisher, Privacy Journal
P.O. Box 28577
Providence, RI 02908

Dear Mr. Smith:

Thank you for your April 1 letter concerning the requirement to request a valid form of identification from commercial airline ticket holders. Since your concerns are identical to those in your previous two letters on this topic, I will reiterate the Federal Aviation Administration (FAA) position.

The FAA issued a Security Directive to be put into effect at airports throughout the country in response to recent intelligence indicating an elevated domestic threat situation. It is a countermeasure listed within this Security Directive that mandated that airlines request a valid form of identification from airline ticket holders. While an airline is required to request identification, the actual presentation of identification by the passenger is not absolutely required, and there is currently no prohibition against allowing someone on an aircraft without such identification. However, the absence of identification may

result in the use of alternative measures that provide the same level of security protection.

Security countermeasures issued by the FAA in a Security Directive establish security minimums for adoption by airlines and airports. Airlines and airports may exceed those minimum standards by implementing more stringent security requirements. Where airlines implement additional or more stringent measures, passengers may sometimes experience differences in procedures as they undergo processing. Refusal to allow a passenger without a photo identification to board the aircraft is an example of such differences, and is the policy of an individual airline; this is not an FAA security requirement.

As always, the highest priority of the FAA is the safety and security of the traveling public. Your concerns are duly noted.

Sincerely,

/s/ Cathal L. Flynn
Cathal L. Flynn
Associate Administrator for
Civil Aviation Security

---



**EXHIBIT B**

Associate Administrator
for Civil Aviation Security

[LOGO]
U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., SW.
Washington, DC 20591

MAY 20, 1997

Mr. Samuel R. Weiler
4902 Forbes Avenue
Pittsburgh, PA 15213

Dear Mr. Weiler:

This is in response to your October 23, 1996, letter, which has been remanded to the Office of the Associate Administrator for Civil Aviation Security for reconsideration. We apologize for the delay in responding to your request. On August 5, 1996, you requested a broad range of documents related to the requirement that airlines request a valid form of identification from commercial airline ticket holders. On January 10, Mr. Kellerman called you to clarify the scope of your request. During this conversation you reiterated the substance of your correspondence.

On July 10, 1989, the *Federal Register* published an amendment to Title 14 of the Code of Federal Regulations, Part 108 (14 CFR Part 108), that provided for the issuance of security directives and information circulars as a means of disseminating information concerning threats against civil aviation. This amendment was designated 14 CFR Part 108.18.

In response to intelligence indicating a threat of terrorism, the Federal Aviation Administration (FAA) has required airlines to request a valid form of identification from airline ticket holders. While an airline is required to request the identification, its actual presentation by the passenger is not mandatory, and there is currently no prohibition against allowing someone on an aircraft without such identification. The absence of identification, however, requires the airline to use alternative measures to provide the same level of security protection.

The security directive (SD) in force at the time of your flight would be the governing legal document sent to the airlines relative to the question of ID checks. When necessary, a policy guidance letter may be sent by FAA in order to clarify the Government's intent or to address an airline's interpretation of security measures in an SD; measures such as ID checks. Neither of these documents are disseminated to the public, nor are they releasable.

Referring to your last letter: 1) There are no relevant segregable portions of any security document FAA has sent to an airline that would not compromise security. 2) All documents covered by your original request were addressed in the September 24, 1996, denial in terms of FAA's legal response. 3) Documents produced by FAA have not, as asserted, been widely released.

These documents fall within Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)), which permits the withholding of records specifically exempted from disclosure by another statute. The applicable statute in this instance is 49 U.S.C. Section 40119(b), which states, in part, that the Administrator may prescribe regulations he considers necessary to prohibit disclosure of any information obtained or developed



in the conduct of security or research and development activities if he concludes that disclosure would be detrimental to the safety of persons traveling in air transportation.

The safety regulation issued under 49 U.S.C. Section 40119(b) can be found in 14 CFR 191.7(b) which exempts from disclosure security directives, information circulars, and any comments, instructions, or implementing guidance pertaining thereto. Accordingly, it has been determined that the disclosure of this SD or other documents related to this issue would be detrimental to the safety of persons traveling in air transportation. Therefore, your request for release of documents is denied.

The undersigned is responsible for this denial. You may request reconsideration of this determination by writing to:

Associate Administrator for Administration
FAA Headquarters
800 Independence Avenue, SW.
Washington, DC 20591

Your request for reconsideration must be made in writing within thirty (30) calendar days from the date of receipt of this letter and must include all information and arguments relied upon. Your letter must state that it is an appeal of the above-described denial of a request made under the FOIA. The envelope containing the appeal must be marked "FOIA."

Sincerely,

/s/ Cathal L. Flynn
Cathal L. Flynn
Associate Administrator for
Civil Aviation Security

**EXHIBIT C**

[LOGO]

**SOUTHWEST AIRLINES CO.**

James F. Parker
Vice President
General Counsel

P.O. Box 36611
Dallas, Texas 75235-1611
214-792-4138
214-792-6660 (Facsimile)

June 14, 2001

Dr. Richard H. Weil
2057 Fairmount Avenue
St. Paul, MN 55105

Dear Dr. Weil:

I am in receipt of your letter dated May 21, 2001, addressed to Herb Kelleher, Chief Executive Officer, Southwest Airlines Co. Even though I will not be assuming Herb's title as Chief Executive Officer until June 19, 2001, he has asked me to respond to you just to see if I'm ready!

First and foremost, I want to thank you for your complimentary remarks about Southwest Airlines. The mission of Southwest Airlines includes dedication to the highest quality of Customer Service delivered with a sense of warmth, friendliness, individual pride, and spirit, and I am hopeful and confident that we can deliver on this mission.

Unfortunately, I am unable to discuss with you the FAA-mandated requirement that, under certain circumstances, Southwest Airlines and all other domestic air carriers request identification from their Customers. This



inability does not stem from any unwillingness on the part of Southwest Airlines to challenge the FAA (as we have done on countless occasions over our 30 year history), but instead derives from an FAA-imposed mandate which effectively prevents Southwest Airlines from disclosing sensitive security information to the general public.

Although I have not provided you with the response that you were seeking, I am afraid it is the only response possible under the circumstances. Therefore, we must respectfully decline to join you in opposing the requirement that Customers present identification. Thanks in advance for your understanding.

Sincerely

/s/ Jim Parker
James F. Parker

cc: Mr. Herbert D. Kelleher

**EXHIBIT D**

[LOGO] **THE SECRETARY OF TRANSPORTATION**
WASHINGTON, D.C. 20590

December 27, 2001

Dr. Richard Weil
2057 Fairmount Avenue
St. Paul, MN 55105

Dear Dr. Weil:

Congresswoman Betty McCollum has asked me to respond to your letter concerning requirements to show photo identification before boarding an aircraft.

Title 49, United States Code (U.S.C.), requires air carriers to screen all passengers and property to be carried on board commercial passenger aircraft and to refuse transportation to persons who refuse such screening. Part 108 of Title 14 of the Code of Federal Regulations (14 CFR) states that airlines must have a security program that provides for the safety of persons and property traveling in air transportation. The Federal Aviation Administration (FAA) approves that air carrier standard security program. Airlines may implement additional or more stringent security measures that can result in differences in procedures. The security programs are protected from disclosure by another Federal statute (5 U.S.C. Section 552(b)(3)).

The FAA does require the air carriers to request valid forms of identification from their ticket holders. However, should a passenger not present acceptable identification because they do not have a photo identification card or refuse to show such identification, an air carrier must apply alternative measures of their choosing that provide



the same level of security protection. Some of these alternative means are visible to the passenger and some are not. It is the carrier's right to deny boarding rights to any passenger it does not believe can be properly screened.

Inspection of identification media is just one means the airlines use to fulfill security requirements, because photo identification cards, as you point out, can be illegally falsified. Although it may slow down some ticket and check-in lines, asking for identification does provide some deterrence value. Checking the identification card necessitates the air carrier employee and the passenger make eye contact and does require the air carrier employee to match the face with the identification. Anything that adds additional deterrence and enhances security is valuable, especially in light of the September 11 events.

The requirement that a passenger's middle initial be on every ticket is not an FAA requirement; it is an airline requirement. Perhaps the air carriers can provide an explanation of this requirement.

The requirements for photo identification are not tied to the FAA's computer-assisted passenger prescreening system (CAPPS). CAPPS selection criteria are based on parameters developed within the counterterrorism community and reviewed by the Department of Justice to ensure nondiscriminatory methods of passenger selection. In addition, the FAA has no plans to fingerprint every traveler.

In response to the horrific events of September 11, not only do we believe it is imprudent to withdraw the requirement for identification checks at this time, we are requiring even more security measures for U.S. airports and air carriers and for foreign air carriers with flights to

the United States. Despite the inconvenience of these measures, the public understands and, in most cases, seems to welcome the extra security measures. We continue to enhance security requirements for airports and air carriers across the country and are proud of the unprecedented level of cooperation attained among the Federal Government, the public, airport operators, and air carriers to implement those procedures quickly and effectively.

I appreciate your interest in aviation security.

Sincerely yours,

/s/ Norman Y. Mineta
Norman Y. Mineta

cc: Congresswoman Betty McCollum



**EXHIBIT E**

**Hearing Transcript from January 17, 2003:**

---

Attorneys for John Gilmore:
William M. Simpich
1736 Franklin Street, 10th Floor
Oakland, CA 94612
(510) 444-0226

James Harrison – Co-Counsel
980 9th St., 16th Floor
Sacramento, CA 95814
(916) 452-4905

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

| | |
|---|---|
| JOHN GILMORE,<br>PLAINTIFF,<br>VS.<br>JOHN ASHCROFT, ET AL.<br>DEFENDANT. | NO. C 02-3444 SI<br>PAGES 1 - 40 |

SAN FRANCISCO, CALIFORNIA
FRIDAY, JANUARY 17, 2003

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN ILLSTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR PLAINTIFF:
WILLIAM M. SIMPICH, ESQ.
1736 FRANKLIN STREET, TENTH FLOOR
OAKLAND, CALIFORNIA 94612

JAMES P. HARRISON, ESQ.
980-9TH STREET, 16TH FLOOR
SACRAMENTO, CALIFORNIA 95814

FOR DEFENDANT:

KEVIN V. RYAN
UNITED STATES ATTORNEY
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION
20 MASSACHUSETTS AVENUE N.W., ROOM 7300
WASHINGTON, DC 20530

BY: JOSEPH W. LOBUE, ESQ.
ASSISTANT U.S. ATTORNEY

REPORTED BY: JAMES YEOMANS, CSR, RPR
OFFICIAL REPORTER, USDC
COMPUTERIZED TRANSCRIPTION
BY ECLIPSE

[2] FOR DEFENDANT SOUTHWEST AIRLINES: PIPER RUDNICK LLP
1999 AVENUE OF THE STARS
FOURTH FLOOR
LOS ANGELES, CALIFORNIA
90067

BY: JANE H. BARRETT, ESQ.

FOR DEFENDANT UNITED AIRLINES: CODDINGTON, HICKS & DANFORTH
555 TWIN DOLPHIN DRIVE,
SUITE 300
REDWOOD CITY, CALIFORNIA
94065

BY: KATHRYN M. CARROLL,
ESQ.



[3] FRIDAY, JANUARY 17, 2003 9:00 A.M.

(PROCEEDINGS HELD IN OPEN COURT:)

THE CLERK: CIVIL 02-3444, JOHN GILMORE VERSUS ASHCROFT.

MR. SIMPICH: GOOD MORNING, YOUR HONOR.

WILLIAM SIMPICH AND JAMES HARRISON APPEARING FOR THE PLAINTIFF.

THE COURT: GOOD MORNING.

MR. LOBUE: JOSEPH W. LOBUE, DEPARTMENT OF JUSTICE, FOR THE FEDERAL GOVERNMENT.

MS. BARRETT: GOOD MORNING, YOUR HONOR.

JANE BARRETT FOR SOUTHWEST AIRLINES.

MS. CARROLL: GOOD MORNING, YOUR HONOR.

KATHRYN CARROLL FOR UNITED AIRLINES.

THE COURT: GOOD MORNING.

FIRST, WITH RESPECT TO UNITED AIRLINES, DO THE REMAINING PARTIES AGREE THAT UNITED CAN BE SEVERED FROM THIS LITIGATION?

MR. SIMPICH: DUE TO THE BANKRUPTCY STATUS, I ASSUME?

THE COURT: YEAH.

MR. SIMPICH: IF IT HASN'T CHANGED, I AGREE, YOUR HONOR, YES.

MR. LOBUE: GOVERNMENT HAS NO OBJECTION.

MS. BARRETT: SOUTHWEST HAS NO OBJECTION.

* * *

[31] THERE IS NO RULE REQUIRING PRODUCTION OF ID'S FOR WHICH ONE CAN BE ARRESTED, THERE'S NOTHING LIKE THAT. PLAINTIFF WASN'T ARRESTED, HE WAS ASKED FOR AN IDENTIFICATION CARD, THAT'S IT.

WHEN HE DIDN'T PRODUCE IT HE LEFT. HE WASN'T DETAINED, HE WASN'T SEIZED, HE WAS ASKED FOR IDENTIFICATION.

THE COURT: COULD YOU JUST SAY THAT ONCE AGAIN, THE RULE IS, DON'T CARRY BOMBS AND GUNS ONTO AIRPLANES?

MR. LOBUE: DON'T ATTEMPT TO HIJACK AIRPLANES.

THE COURT: THAT'S THE RULE?

MR. LOBUE: THAT'S THE RULE.

THE COURT: WHAT IS THE RULE, IF AT ALL, CONCERNING IDENTIFICATION?

MR. LOBUE: THE IDENTIFICATION CHECK, EVERY PASSENGER IS REQUESTED TO PRODUCE IDENTIFICATION. AS I'VE INDICATED, THE STATUTE PROVIDES ONE OF THE PURPOSES TO CHECK



WHETHER THAT PERSON IS AMONGST THOSE KNOWN TO POSE A RISK TO AVIATION SAFETY.

THE OTHER REASON IT'S USED FOR PURPOSES OF THE PRESCREENING SYSTEM, IS THIS A PERSON –

THE COURT: I UNDERSTAND IT, YOU SAID ALL OF THAT. YOU WERE SAYING THE RULE IS NOT VOID FOR VAGUENESS AND WE CAN MOVE ON. I JUST WANT TO KNOW WHAT THE RULE IS THAT ISN'T VOID.

MR. LOBUE: IF YOU'RE ASKING ME TO DISCLOSE WHAT'S IN THE SECURITY DIRECTIVES, I CAN'T DO IT.

[32] THE COURT: I WANT TO KNOW WHAT WE'RE TALKING ABOUT IN THIS CASE. THIS MAN WAS TOLD, "GIVE ME YOUR ID?"

MR. LOBUE: ACCORDING TO THE COMPLAINT THE GOVERNMENT MANDATED AIRPLANES TO REQUEST IDENTIFICATION FROM EACH AND EVERY PASSENGER, THAT'S WHAT HAPPENED.

THE COURT: I NEED TO KNOW WHAT CITE I'M TALKING ABOUT WHEN I TRY TO MAKE A DECISION WHETHER THIS COMPLAINT STATES A CLAIM. SO CAN I FOCUS ON THAT, THAT THE GOVERNMENT REQUIRED THE AIRLINE TO –

MR. LOBUE: I THINK YOU HAVE TO ASSUME THAT THE ALLEGATIONS IN THE COMPLAINT ARE, IN FACT, TRUE FOR PURPOSES OF OUR MOTION, YES. THAT THE GOVERNMENT REQUIRED

THE AIRLINES TO REQUEST IDENTIFICATION FROM THE PASSENGERS.

THAT WHEN THEY REFUSE TO PROVIDE IT, THAT SOUTHWEST AIRLINES REFUSED PASSAGE, AND UNITED AIRLINES INDICATED THAT THE PLAINTIFF WOULD BE ALLOWED TO FLY IF HE SUBMITTED TO A FURTHER SEARCH.

WE WERE PREPARED TO ASSUME ALL OF THAT IS TRUE FOR PURPOSES OF THE COMPLAINT, THEY ACTED AT THE INITIATIVE OF THE GOVERNMENT. AT THE BEHEST OF THE GOVERNMENT.

THE COURT: THANK YOU.

MR. LOBUE: ON THE RIGHT TO TRAVEL ISSUE, TURNING TO THAT, IT'S NOT AN ABSOLUTE RIGHT, IT'S A RIGHT NOT TO BE – TO BE UNINHIBITED BY RULES WHICH UNREASONABLY BURDEN OR RESTRICT THE RIGHT TO FREE MOVEMENT.

[33] YOU'RE NOT ENTITLED TO BE COMPLETELY FREE FROM GOVERNMENT REGULATION BECAUSE YOU'RE IN TRAVEL STATUS. THE NINTH CIRCUIT IN MILLER VERSUS REED MAKE CLEAR THAT THERE IS NO RIGHT TO THE MOST CONVENIENT FORM OF TRAVEL. NOBODY HAS A

* * *

[40] MARTINELLI, CAREY, ON THAT LINE.

IN REGARDS TO THE RIGHT TO TRAVEL ISSUE WHICH COUNSEL ARGUES THEY SHOULD NOT BE LIABLE FOR, AGAIN, THIS GOES RIGHT BACK TO THE SECRET LAW ISSUE, AS TO WHETHER OR NOT THEY HAVE THE RIGHT TO DEMAND ID OR NOT. WE



DO NOT KNOW WHAT THAT LAW IS BECAUSE IT'S NOT BEEN PUBLISHED. THE GOVERNMENT HAS STATED, AS WE MENTIONED IN OUR ADDENDUM THAT THE AIRLINES ARE NOT MANDATED TO DEMAND, MERELY REQUEST IT.

THE COURT: ALL RIGHT. THANK YOU.

(COURT ADJOURNED:)

CERTIFICATE OF REPORTER

I, JAMES YEOMANS, OFFICIAL REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA 94102, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 40, INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING

BY COMPUTER TO THE BEST OF MY ABILITY.

/s/ James Yeomans FEBRUARY 17, 2003

JAMES YEOMANS, RPR, CSR